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Decision

Matter of: MCS Management, Inc.

File: B-285813; B-285882

Date: October 11, 2000

Sam Z. Gdanski, Esq., Jeffrey I. Gdanski, Esq., and Scott H. Gdanski, Esq., for the protester.

Julius Rothlein, Esq., U.S. Marine Corps, and Genemarie M. Pade, Esq., Small Business Administration, for the agencies.

David A. Ashen, Esq., and John M. Melody, Esq., Office of General Counsel, GAO, participated in preparation of the decision.

DIGEST

1. Protest that agency requirements for regional garrison food service should be set aside for small business concerns is denied where agency reasonably determined that there was no reasonable expectation of receiving fair market price offers from at least two responsible small business concerns; there was no indication that small business concerns had experience performing food service contracts of the scope and complexity of the new regional requirements, which combined features such as geographically dispersed messhalls across an entire region, rather than at individual installations; responsibility for the management of numerous messhalls, rather than for just a few messhalls or for only less demanding mess attendant services; need for use of advanced food technology, including centralized food processing; and responsibility for the purchase and ownership of subsistence.

2. Protest that agency improperly consolidated its garrison food service requirements, including work currently performed under 11 contracts and work currently performed by the government, into two regional contracts is dismissed where there is no showing that protester was prejudiced by consolidation; although protester challenges claimed benefits of the consolidated procurement approach, it failed to demonstrate that consolidation significantly inhibited or precluded its competing for the award, and instead argued that the requirements do not differ significantly in character from its current food service contracts and that it can perform the consolidated requirement.

DECISION

MCS Management, Inc. protests the terms of request for proposals (RFP) Nos. M00027-00-R-0001 (RFP 0001) and M00027-00-R-0002 (RFP 0002), issued by the U.S. Marine Corps (USMC) for regional garrison food service. MCS, a small business concern, argues that the requirements should be set aside for small business concerns. MCS also challenges the consolidation of the agency's food service requirements into two contracts (from 11 contracts currently).

We deny the protests.

BACKGROUND

The RFPs provide for award of two primarily fixed-price incentive contracts, with a base period of 5 years, with 3 option years, to provide regional garrison food service at: (1) 32 messhalls on the east coast (RFP 0001), including messhalls at the Marine Barracks, in the District of Columbia; Henderson Hall, Marine Corps Base Quantico, and Marine Security Force Battalion Norfolk in Virginia; Camp Lejeune, Marine Corps Air Stations Cherry Point and New River, and Marine Corps Auxiliary Landing Field Bogue, in North Carolina; and Marine Corps Recruit Depot Parris Island and Marine Corps Air Station Beaufort in South Carolina; and (2) 23 messhalls on the west coast (RFP 0002), including messhalls at Camp Pendelton, 29 Palms, Marine Corps Air Station Miramar, Marine Corps Recruit Depot San Diego, and Mountain Warfare Training Center Bridgeport, in California; and Marine Corps Air Station Yuma in Arizona. USMC currently is contracting for full food service at eight of the messhalls, including three operated by MCS (two at Camp Lejeune and one at Camp Pendelton) and five operated by National Industries for the Severely Handicapped (NISH) workshops; MCS currently provides messhall management, food preparation and mess attendant services at its three full food service messhalls.

Under the solicitations, the number of full food service messhalls will increase to 35. USMC has current contracts for mess attendant services at 28 of the messhalls, including 18 serviced by MCS and 10 serviced by four other small business concerns. Under the solicitations, mess attendant messhalls will be reduced in number to 17 and will become management and mess attendant messhalls, with the contractors now also responsible for management of the messhalls (as well as furnishing mess attendant services). (Food preparation will continue to be performed by USMC cooks at the management and mess attendant messhalls). The contractors also will become responsible under the solicitations for management and food preparation for three brig messhalls not previously contracted out. In addition, under the solicitations, the procurement of subsistence (food) and (after a transition period) maintenance and repair of government food preparation and serving equipment, previously the responsibility of the government, will become the contractor's responsibility at all messhalls. Further, the number of messhalls set-aside under the Javits-Wagner-O'Day Act (JWOD), 41 U.S.C. §46-48c, is increased from 9 to 20; JWOD organizations for the blind or other severely handicapped will operate the messhalls

as subcontractors to the contractors. Hearing Transcript (Tr.) at 26, 32; Agency Report, exhibit (exh.) 38 at 5.

As noted in the RFPs, the contemplated contracts have as their “ultimate goal, maximizing food service efficiencies and technology in an effort to continue to provide quality food services for United States Marine Corps personnel and other authorized patrons while at the same time realiz[ing] savings over current Marine Corps food service operating processes.” RFPs 0001 and 0002 at § C1.5.1.2. To this end, the RFPs encourage the submission of proposals

based upon the use of advanced food preparation and production technologies and other economies of scale in order to provide continuous quality food service support at the lowest possible cost. The offeror may propose a central production facility (CPF), utilizing technology like cook chill. The Contractor may offer construction of their own CPF; procurement of products through their own existing CPF or a third party’s excess CPF capacity; procurement of cook chill products from a third party and/or a combination of these options.

Id. In addition, the RFPs specifically require offerors to describe in detail their advanced food technology plans—including the manner in which advanced food production technologies will be incorporated across the entire spectrum of the requirements and any centralized processing, production, transportation and distribution efforts to be used—and list as one of the technical evaluation subfactors an offeror’s proposed advanced food technology plan. RFPs 0001 and 0002 at §§ C.1.5.1.2, M.3.4.2.

Although the solicitations do not expressly require the use of centralized food processing, the record indicates that USMC believed that the successful offeror necessarily would have to base its proposal on such a centralized approach together with cook chill technology, with 50 to 70 percent of the food processed in this manner; and the agency considers centralized food production to be fundamental to achieving the anticipated cost savings from the new procurement approach. Tr. at 21, 39, 85, 140; Agency Comments, Aug. 30, 2000, exh. 38, at 8-11; Agency Report, exh. 5, Contracting Officer’s Statement of Facts, at 1, exh. 9, Updated Economic Analysis (EA) of Regionalized Mess Contracting, June 30, 2000, at § 4f, and exh. 12, United States Marine Corps Food Service Program: Regional Garrison Messhall Contract Brief for the Small Business Administration, Feb. 3, 1999.

As an example of the efficiencies possible under such an approach, the agency has cited its use of centralized food processing using cook chill technology in Okinawa and commercial experience in the continental United States. Specifically, in Okinawa, USMC converted a discontinued milk plant into a centralized food processing plant using cook chill processes to supply nine messhalls. Food purchased in bulk is processed there in one of several mass production processes: (1) fruits and vegetables are automatically cut, chopped, cleaned, and vacuum sealed

in bags with nearly all of the air removed, so as to be good for 10-21 days; (2) meats are spiced and placed in vacuum sealed bags, automatically slow cooked in 1,000-pound tanks, rapidly chilled using ice water, and then placed in inventory, usually for 10-14 days; and (3) ingredients are placed in steam kettles with agitators that cook and mix the ingredients, after which the mixture is pumped into vacuum sealed bags and then rapidly cooled in a tumbler chiller using ice water. The processed food in inventory is kept chilled at temperatures just above freezing, transported when needed to the messhalls, and then reheated for serving. Tr. at 186-235, 282-86.

The agency anticipates that using a similar centralized approach on each coast, made possible by and in conjunction with its contemplated consolidated regional contracts, will result in savings with respect to labor (including releasing 594 Marine cooks to other duties), food, utilities and maintenance and replacement of food equipment, of at least \$20 million per year. USMC also anticipates improved quality, consistency and safety of food, and a reduction in contract administration costs (associated with contractor assumption of responsibility for subsistence procurement and a reduction in the number of contracts from 11 to 2). Agency Report, exh. 9, Updated Economic Analysis (EA) of Regionalized Mess Contracting, June 30, 2000; Agency Comments, Sept. 26, 2000, at 4-6; Tr. at 76-84, 282-86.

SMALL BUSINESS SET-ASIDE

MCS argues that the information available to USMC before it issued the solicitation indicated that there were at least two small business concerns, including the protester, capable of performing the contemplated contracts, such that the agency was required under the Federal Acquisition Regulation (FAR) to set aside the procurements for small business concerns. In this regard, contracting officers generally are required to set aside for small business all procurements valued in excess of \$100,000 if there is a reasonable expectation of receiving fair market price offers from at least two responsible small business concerns. FAR § 19.502-2(b); Safety Storage, Inc., B-280851, Oct. 29, 1998, 98-2 CPD ¶ 102 at 3. The Small Business Administration (SBA) has furnished a report in response to MCS's protest, in which it concurs with the protester that it was improper to issue the RFPs on an unrestricted basis. MCS maintains (as does SBA) that the agency failed to make reasonable efforts prior to issuing the solicitation to ascertain whether two small business concerns could perform the requirements at a fair market price.

The determination as to whether there is a reasonable expectation of receiving fair market price offers from at least two responsible small business concerns a matter of business judgment within the contracting officer's discretion that we will not disturb absent a showing that it was unreasonable. Neal R. Gross & Co., Inc., B-240924.2, Jan. 17, 1991, 91-1 CPD ¶ 53 at 2. However, a contracting officer must make reasonable efforts to ascertain whether it is likely that offers will be received

from at least two responsible small businesses at fair market prices, Mortara Instrument, Inc., B-272461, Oct. 18, 1996, 96-2 CPD ¶ 212 at 3, and we will review a protest to determine whether a contracting officer has made such efforts. Library Sys. & Servs./Internet Sys., Inc., B-244432, Oct. 16, 1991, 91-2 CPD ¶ 337 at 7.

While the use of any particular method of assessing the availability of small businesses is not required, and measures such as prior procurement history, market surveys and advice from the agency's small business specialist and technical personnel may all constitute adequate grounds for a contracting officer's decision not to set aside a procurement, American Imaging Servs., Inc., B-246124.2, Feb. 13, 1992, 92-1 CPD ¶ 188 at 3, the assessment must be based on sufficient facts so as to establish its reasonableness. McSwain & Assocs., Inc.; Shel-Ken Properties, Inc.; and Elaine Dunn Realty, B-271071 et al., May 20, 1996, 96-1 CPD ¶ 255 at 2-3.

USMC maintains that it undertook reasonable efforts to identify possible small business interest and capabilities, and reasonably concluded that there was no expectation that offers could be obtained from two responsible small business concerns at a fair market price. In this regard, USMC notes that, before issuing the RFPs on an unrestricted basis on January 7, 2000, the agency: (1) met with SBA on February 3, 1999 to seek that agency's input into its regional garrison feeding approach; (2) sent letters on February 9 to all eight USMC small business incumbent messhall contractors requesting input as to "how small businesses can best remain involved" in, and how innovative techniques and technologies could best be applied to, the agency's regionalization approach, including use of a central, regional food processing facility, Agency Comments, Aug. 30, 2000, exh. 32; (3) on March 3 issued to 33 companies that had previously responded to a February 1999 request for information (published in the Commerce Business Daily) a presolicitation notice requesting information as to concepts, ideas and suggestions on how industry could service messhalls on a regional basis; (4) conducted industry forums in May 1999 on both the east and west coasts in an effort to determine small business interest and capability to perform the new requirement; (5) issued a draft statement of work on July 31; and (6) having received no indication that small business concerns were capable of and interested in meeting the regional garrison feeding requirements, and with the concurrence of the USMC Small Business Specialist, notified SBA on September 15 of the agency's determination not to set aside the requirements for small business concerns (as well as its determination to consolidate the requirements into two regional contracts).¹

USMC reports that on October 12, 1999, it became aware of five letters from small business concerns, including MCS, all dated early July and addressed to SBA, in

¹ SBA subsequently appealed the agency's non-set aside determination to the contracting officer, to the head of the contracting activity and, ultimately, in January 2000, to the Secretary of the Navy.

which the small business concerns expressed interest in submitting a proposal. Agency Report at 5.² Although both MCS and SBA cite these letters as requiring a determination to set aside the procurement, USMC determined that the letters nevertheless did not support an expectation that offers could be obtained from at least two responsible small business concerns. In this regard, as noted by USMC, four of the letters appeared to have been based on a standard form, stating identically that “[t]he following is a brief company history that demonstrates our ability to provide a fair market offer and our capability of performing the contract requirements,” and one of these four still even included the direction “(Note: Please provide company information/business history here.).” Further, as also noted by USMC, notwithstanding this direction, three of the five letters amounted to little more than a short, less than one page, expression of interest in the procurement, providing little or no explanation of the firms’ ability to perform one of the contemplated consolidated regional contracts.³

Although the letters from MCS and another small business concern provided more specific information about the firms’ prior food service contracts, USMC concluded that this information still did not warrant a set-aside. According to the agency, the new regional food service requirements are fundamentally and qualitatively different from past efforts in that they combine geographically dispersed messhalls across an entire region, rather than at individual installations; the necessity for using advanced food technology, such as a cook chill facility, rather than primarily relying on a cook-to-serve approach; responsibility for the management of all messhalls, rather than for just a few, and for the purchase and ownership of subsistence and for equipment maintenance and repair, previously the responsibility of the government; and expected overall contract values totaling between \$41.9 and \$46.6 million each per year, rather than the prior efforts of between \$360,000 and a little over \$7 million per year. Given the fundamental change in and significant expansion of the scope of the agency’s food services requirement, USMC maintains that the experience of the responding small business concerns, consisting of, at best, limited messhall contracts on the installation level, did not warrant a finding that they were capable of meeting the new requirement.⁴

² MCS had written to USMC in March 1999 both to discuss its general qualifications and to question the agency’s procurement approach, and at least three other small business concerns had written to question the procurement approach. Agency Report, exh. 14.

³ While one of these three letters indicated that there was an enclosure containing a list of recent food service experience, USMC reports that no such enclosure was attached. Agency Report, exh. 5, Contracting Officer’s Statement of Facts, at 8.

⁴ USMC also determined that, since the messhalls were military dining facilities subject to the Randolph-Sheppard Act, 20 U.S.C. §§ 107-107f (1994), the agency was required to invite Randolph-Sheppard state licensing agencies (SLA) to compete for
(continued...)

We conclude that USMC reasonably determined not to set aside the requirements for small business concerns. The record reflects that for at least a year prior to issuing the solicitation, USMC undertook extensive and repeated efforts to publicize its new regional requirements, identify possible small business interest and capabilities, and otherwise solicit input into its procurement plans from SBA, small business concerns familiar with USMC food service requirements and other interested parties.

Further, in the course of developing the protest record, the parties were requested and afforded the opportunity to submit further information concerning the capabilities of the small business concerns expressing an interest in this procurement. USMC maintains that, even with this additional information concerning the small business concerns in question, there is no reasonable expectation that offers could be obtained from two responsible small business concerns at a fair market price.

The agency's position is reasonable. The record shows that one of the five small business concerns whose written response was cited by the protester and SBA identified only two food service contracts in response to USMC's September 2000 inquiry: an expired mess attendant contract which the contracting agency reported had a peak yearly value of approximately \$2.6 million, and a current full food service contract with a reported yearly value of approximately \$544,000. Another of the five small business concerns reported on SBA's PRO-Net database that it had average annual gross revenue of \$2.8 million, but is reported by Dun & Bradstreet as having sales of only approximately \$2.5 million. Although this concern promised to, but did not, respond to USMC's September 2000 inquiry, the agency identified a single expiring mess attendant contract with a peak yearly value of approximately \$569,000, and the protester identified two apparently expired or expiring mess attendant contracts with a total yearly value of approximately \$930,000. At most, therefore, this concern appeared to have had recent food service contracts with a yearly value of no more than approximately \$1.5 million. Moreover, we note that the Dun & Bradstreet report for this firm lists prior and current liens for outstanding tax liabilities.

The third of the five small business concerns responded to USMC's inquiry by listing three mess attendant contracts and one full food service contract, with two of the

(...continued)

the requirements, and that, because SLAs are not small business concerns, a small business set-aside was precluded. MCS and SBA disagree, asserting that the Act did not require a set-aside here. Given our conclusion, discussed below, that the agency reasonably determined that there was no expectation that offers could be obtained from two responsible small business concerns at a fair market price, we need not address this issue.

four contracts having expired in fiscal years 1998 and 1999 and the two others expiring in fiscal year 2000 (which ended on September 30, 2000). The total average yearly value of the contracts expiring in fiscal year 2000 was only approximately \$1.93 million, and even when the contracts expiring in fiscal year 1998 are considered, the total average yearly value was only approximately \$3.3 million. (Although this firm reported on PRO-Net that it had average annual gross revenue of \$10.5 million and is reported by Dun & Bradstreet as having sales of approximately \$8.2 million, only one of the six contracts listed on PRO-Net was for food services and Dun & Bradstreet reports the firm as being 85 percent custodial and only 5 percent food service.) Agency Comments, Sept. 26, 2000, exh. 54; Agency Comments, Sept. 15, 2000, exh. 41; see MCS Comments, Sept. 25, 2000, at 12-32.

The fourth small business concern, which prior to issuance of the solicitation furnished the most details to USMC (via SBA) concerning its prior food service contracts, similarly appears to have had experience performing only smaller food service contracts. This concern identified 13 food service contracts in response to USMC's September 2000 inquiry. The yearly value of the 10 contracts identified by this concern as having been performed in fiscal year 2000 totaled no more than approximately \$7.7 million; 6 of the 10 contracts were only for mess attendant services, and the largest contract (a mess attendant contract) had a yearly value of only approximately \$1.44 million. Agency Comments, Sept. 26, 2000, exh. 54; Agency Comments, Sept. 15, 2000, exh. 41.

There is no indication in the record that any of these four cited small business concerns possessed experience with the advanced food technology, including centralized food processing, determined by the agency to be essential to successfully performing the new regional requirements. Further, none of the concerns had performed food service contracts of the magnitude contemplated here, where the agency's estimate of the smaller east coast requirement was approximately \$41.9 to \$44.4 million per year, including a non-food cost of approximately \$17.65 to \$20.14 million and a food cost of approximately \$24.26 million. Nor is there any indication in the record that any of these four concerns had performed a food service contract combining features such as geographically dispersed messhalls across an entire region, rather than at individual installations; responsibility for the management of numerous messhalls, rather than for just a few messhalls or for only less demanding mess attendant services; and responsibility for the purchase and ownership of subsistence and for equipment maintenance and repair. Given the fundamentally expanded scope and complexity of the agency's food services requirement, we think USMC reasonably concluded that there was no reasonable expectation that such small business concerns, with primarily limited messhall contracts on the installation level, possessed the capabilities, resources and experience to satisfactorily perform the contemplated regional contracts. Thus, even if there was a reasonable expectation that MCS was a responsible offeror that could be expected to submit a fair market price offer, USMC reasonably concluded that there was no reasonable expectation of receiving fair market price offers from

at least two responsible small business concerns so as to warrant setting aside the requirements for small business concerns.⁵

CONSOLIDATION

MCS also argues that USMC's consolidation of its food service requirements into two regional contracts violates provisions of the Small Business Act, 15 U.S.C.A. § 631(j)(3) (West Supp. 1999), which requires agencies to avoid unnecessary and unjustified bundling of contract requirements that preclude small business participation in procurements as prime contractors. Likewise, SBA's implementing regulations require agency acquisition planners to "[a]void unnecessary and unjustified bundling of contract requirements that inhibits or precludes small business participation in procurements as prime contractors." 13 C.F.R. § 125.2(d)(2)(ii) (2000).

We dismiss the protest as to this allegation because there is no showing that MCS was prejudiced by the consolidation of the requirements. Competitive prejudice is an essential element of every viable protest. Lithos Restoration Ltd., B-247003.2, 92-1 CPD ¶ 379 at 5. Where the record does not demonstrate that, but for the agency's actions, the protester would have had a reasonable chance of receiving the award, our Office will not sustain a protest, even if a deficiency in the procurement is found. McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see Statistica, Inc. v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996). Here, although MCS strenuously argues that the claimed benefits of the agency's consolidated procurement approach are illusory and/or do not warrant consolidation, the protester has failed to demonstrate that the consolidation significantly inhibits or precludes its ability to compete. On the contrary, MCS vigorously argues that the requirements do not differ significantly in character from its current food service

⁵ Although MCS cites another small business concern which, it asserts, furnished extensive food services to USMC up until June 1995, the protester has been unable to identify recent significant food service contract experience--MCS identified two contracts, at least one of which was a multi-year contract, totaling less than \$600,000--on the part of this concern. MCS Comments, Sept. 25, 2000, at 31-32; MCS Comments, Sept. 6, 2000, exh. 3. In addition, although SBA informed USMC by letter of December 9, 1999, and the Navy by letter of January 13, 2000, that it had been orally advised by still another small business concern currently performing a USMC food service contract that it would submit an offer, SBA Report, Aug. 11, 2000, tabs 2, 4, there is no indication that this concern has more meaningful and significant food services experience than the four small business concerns discussed above.

contracts, and it maintains that it can perform the consolidated requirement. See, e.g., MCS Comments, Sept. 26, 2000, at 37, 41; MCS Comments, Sept. 6, 2000, at 12; MCS Protest, July 19, 2000, at 7-8; MCS Protest, July 10, 2000, at 7. In these circumstances, we conclude that the protester has not made a showing of competitive prejudice as a result of the consolidation of the agency's food service requirements.

The protests are denied.

Anthony H. Gamboa
Acting General Counsel